

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PEGGY J. WILLIAMS**

Claimant

VS.

**WESLEY MEDICAL CENTER**

Respondent

AND

**ZURICH U.S. INSURANCE COMPANY**

Insurance Carrier

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Docket No. 270,044

**ORDER**

Claimant and respondent appeal the August 19, 2009, Review and Modification Award of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded additional permanent partial general disability benefits (work disability) after the ALJ determined that claimant's work disability had increased from the original award of 39 percent assessed by the Appeals Board (Board) in its order of October 21, 2005. Claimant filed her Application for Review and Modification of the Award on February 9, 2009. The ALJ found claimant entitled to a work disability of 83.5 percent and a total award not to exceed \$100,000.00, based on a task loss of 67 percent and a wage loss of 100 percent.

Claimant appeared by her attorney, John C. Nodgaard of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Review and Modification Award of the ALJ. At oral argument to the Board, the parties stipulated that the 67 percent task loss determined by the ALJ in the Review and Modification Award was proper and could be utilized by the Board in calculating the award in this matter. Additionally, the parties agreed that claimant had a 22 percent whole body permanent partial disability on a functional basis, with a 5 percent whole body functional disability that preexisted the original injury in this matter. Both functional

impairments stipulated to before the Board will be utilized in calculating this award. The Board heard oral argument on December 18, 2009.

### ISSUES

1. What is the nature and extent of claimant's injuries and disability from the accident suffered on May 16, 2001, while working for respondent? Is claimant entitled to a modification of the 39 percent whole body work disability awarded by the Board in its Order of October 21, 2005? Respondent argues that claimant is capable of earning the same wages she was earning at the time of the original injury and, under K.S.A. 44-528(b), claimant should be limited to her functional impairment or, at the very least, granted no additional work disability. Claimant counters with the argument that her wage loss has changed and, thus, additional work disability is warranted.
2. Did the ALJ err in the calculation of this award? Respondent cites *Ponder-Coppage*<sup>1</sup> in support of its objection to the amount and method used by the ALJ in calculating this award.

### FINDINGS OF FACT

Claimant suffered an injury to her left foot and ankle, with pain radiating to just below her left knee, on May 16, 2001. The injury resulted in claimant developing an altered gait, which, in turn, aggravated degenerative changes in claimant's low back. The Board, in its Order of October 21, 2005, awarded claimant a 39 percent permanent partial general disability, based on a 21 percent wage loss (which was stipulated to the Board by the parties at the oral argument on September 7, 2005) and a 67 percent task loss. This calculated to a 44 percent whole body disability with a 5 percent preexisting functional impairment, which was deducted from the award. Claimant filed an Application for Review and Modification on February 9, 2009, requesting an increase in her work disability due to her recent loss of job.

Following the May 16, 2001, accident, claimant underwent retraining through Southwestern University and obtained a degree in computer operations. In June 2003, claimant began working for Cox Communications (Cox) and worked there until sometime in 2006. At the time the Award was issued in this matter in April 2005, claimant's employment with Cox was taken into consideration.

At the end of 2006, claimant became employed with Spherion at CCH. Claimant worked there until the summer of 2007, when she was laid off. In the fourth quarter of

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<sup>1</sup> *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

2007, claimant went to work for Convergys, but only worked there for about one month, as the job was too physically demanding. In approximately November 2007, claimant went to work for CCH in its tax department. She worked there until April 2008, when she was laid off. Claimant applied for and was paid unemployment for about six weeks, through May 31, 2008. At this same time, claimant began to look into child care as a profession. While claimant was learning about child care, she also reapplied for unemployment and was paid benefits from July 2008 until the first week of April 2009.

At her April 13, 2009, deposition, claimant testified that her efforts toward child care as a profession were paying off. The week before the deposition, claimant signed a contract with Early Childhood, an entity associated with the federal government. This contract allowed claimant to begin receiving families, which were provided by and funded by the federal government. Claimant felt comfortable in attempting this work as she only had to work 30 hours per week and did not have to sit or stand continuously as was a problem with some of her earlier jobs. Claimant testified that she would receive \$151.00 per week for children three years of age and under and \$130.00 for children four and five years of age. Claimant acknowledged that with this child care licensing business she would be making as much money as she was making with respondent. Claimant testified that she was to receive a notice form within two weeks of the April 13, 2009, deposition. She expected to begin receiving children shortly after that.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-528(d) states:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Claimant's Application For Review And Modification, Form K-WC E-5 (E-5), was filed on February 9, 2009. As the effective date is limited to six months prior to the filing of the application, the modification, if allowed, will be effective August 9, 2008.<sup>2</sup> It is noted that the ALJ used August 10, 2008, as the effective date. However, the E-5 was file stamped February 9, 2009.

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<sup>2</sup> *Id.* at 199.

K.S.A. 44-528(a) states:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

K.S.A. 44-528(b) states:

If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

As noted above, the 67 percent task loss determined by the ALJ has been stipulated to by the parties. The only determination required here is whether claimant suffered an increased wage loss under K.S.A. 44-510e. When claimant lost her job with CCH, she had no income. This translates to a wage loss of 100 percent effective the day the wage loss occurred. The calculation of a work disability of 83.5 percent by the ALJ in the Review and Modification Award is affirmed. However, as also noted above, the statute prohibits any modification to be effective before August 9, 2008.

K.S.A. 44-510e(a) states in part:

. . . the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

K.S.A. 510e(a)(3) states in part:

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

The intent of K.S.A. 44-510e(a) is made clear in *Ponder-Coppage* wherein it states that compensation is limited “to 415 weeks from the date of the work-related accident.”<sup>3</sup>

Claimant was laid off from her job at CCH in April 2008. The ALJ, in the Review and Modification Award, allowed that claimant had suffered an increase in her permanent partial general (work) disability effective April 2008, when she lost the job at CCH. However, the ALJ then allowed benefits to continue until May 4, 2009, when claimant began earning a wage as a child care specialist. K.S.A. 44-510e(a)(3) allows that benefits shall run for 415 weeks from the date of the accident. The Kansas Court of Appeals, in *Ponder-Coppage*, determined that this time limit applied even when a review and modification under K.S.A. 44-528 was being claimed. Here, claimant’s accident occurred on May 16, 2001. And 415 weeks thereafter would be April 29, 2009. Therefore, even with the change in claimant’s disability allowing the modification, the last date on which any modification would be allowed under K.S.A. 44-510e(a)(3) would be April 29, 2009. The Review and Modification Award of the ALJ will be modified accordingly.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Review and Modification Award of the ALJ should be affirmed with regard to the finding that claimant suffered a worsening of her disability resulting in a work disability of 83.5 percent, but modified to limit claimant to a maximum of 415 weeks of permanent partial disability compensation from the date of accident, resulting in a final payment being on April 29, 2009. Additionally, the effective date for claimant’s Review and Modification Award will begin on August 9, 2008, six months before the E-5 was filed with the Division.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 19, 2009, should

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<sup>3</sup> *Id.* at 200.

be, and is hereby, affirmed with regard to the finding that claimant suffered an 83.5 percent permanent partial general disability, but modified with regard to the number of weeks during which claimant is allowed benefits from this modified award. Claimant's permanent partial general disability compensation will begin August 9, 2008, and continue through April 29, 2009.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Peggy J. Williams, and against the respondent, Wesley Medical Center, and its insurance carrier, Zurich U.S. Insurance Company, for an accidental injury which occurred on May 16, 2001, and based upon an average weekly wage of \$600.63.

Claimant is entitled to 37.71 weeks permanent partial disability compensation at the rate of \$400.44 per week or \$15,100.59 for an 83.5 percent permanent partial general disability.

As of the date of this Order, the entire amount would be due and owing and ordered paid in one lump sum less any amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John C. Nodgaard, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge